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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE HAYES,
Petitioner

v.

FRED A. SEATON, Secretary of the Interior,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LEON BOSEAU
810 18th Street, N.W.
Washington 6, D.C.

RALPH CURRIN
CURRIN & FRENCH
Pendleton, Oregon

KOERNER, YOUNG, MCCULLOCH & DEZENDORF
800 Pacific Building
Portland, Oregon
Attorneys for Petitioner

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PAGE

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes and Regulations involved 3

Statement of the case 3

Reasons for granting the writ 6

Conclusion 18

Appendix A—Opinion of Court of Appeals, Dissent of Circuit Judge Burger, and Judgment Below 19

Appendix B—Order denying petition for rehearing en banc 32

Appendix C—Pertinent provisions of Statutes and Regulations 33

CITATIONS

Bowling v. *United States*, 299 F. 438, 444 (C.C.A. 8, 1924) 7, 12

Davie v. *Briggs*, 97 U.S. 628 (1878) 18

Dixon v. *Cox*, 268 F. 285, 289 (C.C.A. 8, 1920) 7, 12

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 7, 8, 9, 10

Fink v. *Prudential Ins. Co.*, 162 Ore. 37, 90 P.2d 762 (1939) 17

Gegiow v. *Uhl*, 239 U.S. 3, 9 (1915) 7, 12

Hefford v. *Metropolitan Ins. Co.*, 73 Ore. 353, 144 P. 2d 695, 702 (1944) 6, 8, 16, 17

Homovich v. *Chapman*, 89 U.S. App. D.C. 150, 191 F. 2d 761, 764 (1951) 7, 13, 14

Kessler v. *Strecker*, 307 U.S. 22, 34 (1939) 7, 12

Lewes's Trusts, In Re, Law Rep. 11 Eq. 326 18

PAGE

Monogahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910) 15
Nepean v. *Doe d. Knight*, 2 M. & W. 894, 150 Eng. Rep. 1021 (Ex 1837) 16
Peoria Tribe or Band of Indians v. *Wea Townsite Co. et al*, 117 F. 2d 940, 943 (C.C.A. 10, 1941) 7, 9, 10, 12
Phene's Trusts, In Re, Law Rep. 5 Ch. 139 18
Seaton v. *The Texas Company*, 103 U.S. App. D.C. 163, 256 F. 2d 718, 723, 724 (1958) 7, 11
Skinner & Eddy Corp. v. *United States*, 249 U.S. 557, 562 (1919) 7, 12
The King v. *Plowright*, 3 Mod. 94, 87 Eng. Rep. 60 (K.B. 1686) 15

Statutes and Regulations:

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348 ..... 2, 3, 7, 8, 10
Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372 ..... 2, 3, 10, 12, 13
Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373 ..... 2, 3, 13
Administrative Procedure Act, Sec. 10, 60 Stat. 243 (1946) 5 U.S.C. sec. 1009 ..... 3, 4
25 C.F.R. pts. 15.1, 15.15, 15.20 3

Congressional documents:

House Report No. 2503 (82nd Cong. 2d Session, Dec. 15, 1952) 10

Miscellaneous:

O.R.S. 41:360 (26) 34
O.R.S. 111.020 (3) (4) 18

PAGE

Federal Indian Law, 1958 ed. 9, 12
4 Davis, Administrative Law Treaties ch. 28 (1958) 15
Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 420 (1958) 15
1 Taylor Evidence (11th Ed., 1920) sec. 200 18
1 Greenleaf Evidence (13th Ed. 1876) sec. 41, footnote 2 at pp. 50, 51 18

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Joe Hayes, Petitioner, who is an American Indian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 9, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 270 F. 2d 319, and is reprinted as Appendix A hereto, p.1. The Court's unreported order denying the petition for rehearing en banc is annexed hereto as Appendix B, p.32. The District Court did not write an opinion. The Opinion of the Acting Solicitor of the Department of the Interior is reported at 64 I.D. 401.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1959, and a dissenting opinion was filed by Judge Warren E. Burger. A petition for rehearing en banc was denied without opinion on October 5, 1959. By Order dated December 17, 1959, Mr. Justice Douglas extended to February 2, 1960, the time to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior is required by Section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 388, 389; 25 U.S.C. sec. 348) to apply State law in determining the heirs of a deceased Indian Allottee?

2. Whether under the doctrine of this Court in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the Secretary of the Interior must follow State law in determining the heirs of a deceased Indian Allottee?

3. Whether a probate determination of the Secretary of the Interior under Section 1 of the Act of June 25, 1910 (36 Stat. 855, 25 U.S.C. sec. 372), involving the estate of an Indian Allottee who died intestate may be reviewed by the Federal Courts?

4. Whether a probate determination of the Secretary of the Interior under Section 2 of the Act of June 25, 1910 as amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. sec. 373), involving the estate of an Indian Allottee who died leaving a will may be reviewed by the Federal Courts?

5. Whether the Secretary's presumption of the date of death of Joseph Thomas to be August 3, 1946 (Exactly seven years from the date of his disappearance) was erroneous and unreasonable?

STATUTES AND REGULATIONS INVOLVED

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348.

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372.

Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373.

25 CFR pt. 15.1

25 CFR pt. 15.15

25 CFR pt. 15.20

Oregon Revised Statute 41:360, (26)

Oregon Revised Statutes 111.020 (3) (4)

STATEMENT OF THE CASE

On September 22, 1940, John Thomas, a Cayuse Indian residing in Oregon, died leaving a will in which he devised all of his allotted Indian property to his son, Joseph Thomas. But Joseph Thomas disappeared on August 3, 1939, some 13 months prior to the death of John, and despite diligent search and inquiry has not been heard of since.

As a result of the death of the father, John Thomas, and the disappearance of the son, Joseph Thomas, the Examiner of Inheritance of the Department of the Interior, under Sections 1 and 2 of the Act of June 25, 1910, as amended (25 U.S.C. secs. 372, 373), and the Department's regulations, probated the estate of John Thomas (valued at $63,811.09) and the estate of Joseph Thomas (valued at $6,259.53).

The rival claimants to the estates of John and Joseph Thomas are two Indians, Emma J. Luton, and petitioner, Joe Hayes. Emma J. Luton is the widow of Samel

Luton deceased maternal half-brother of Joseph Thomas. Joe Hayes is the first cousin and heir-at-law of John Thomas.

The question of whether Emma J. Luton or petitioner Joe Hayes is entitled to inherit the estates of John and Joseph Thomas turned on the single issue of whether Joseph Thomas survived his father John.

Under date of June 20, 1956, the Examiner of Inheritance made an "Order of Presumption of Death and Determining Heirs" in the *estate of Joseph Thomas.* In this order, the Examiner presumed the *date of death* of Joseph Thomas to be August 3, 1946 (seven years after his disappearance), and ruled that Joseph's estate descended to his maternal half-brother, Samuel Luton, who died later, leaving as his sole heir, his wife, Emma J. Luton, a Cayuse Indian.

Under date of June 20, 1956, the Examiner of Inheritance issued another "Order Approving Will and Determining Heir of Subsequently Deceased Devisee" in the *estate of John Thomas.* Presuming the *date of* Joseph's death to be August 3, 1946, the Examiner concluded in his order that Joseph survived his father John; that Joseph took under the devise in his father's will; that upon Joseph's death the estate of John Thomas descended to Joseph's maternal half brother Samuel Luton; that upon the death of Samuel the estate of John Thomas descended to Emma J. Luton, Samuel's widow.

Petitioner took an appeal to the Secretary who affirmed the Examiner's Orders through his Solicitor.

Thereafter, petitioner filed a complaint in the District Court to set aside the Examiner's Orders, invoking the Court's jurisdiction under Section 10 of the Administrative Procedure Act.[1] In his pleadings petitioner asserted

[1] 60 Stat. 243 (1946), 5 U.S.C. sec. 1009.

that the Secretary erred as a matter of law when he presumed the *date of death* of Joseph Thomas to be August 3, 1946 (7 years from the date of his disappearance), thereby presuming that Joseph Thomas survived the testator John Thomas; that since Emma Luton was claiming the estate of John Thomas as the representative of the devisee Joseph, she had the burden of proving that Joseph survived John; that since she failed to prove that Joseph survived John, the devise to Joseph lapsed and the estate of John was inherited by petitioner under Oregon law by virtue of his relationship as the first cousin and heir-at-law of John Thomas.

In his pleadings in the District Court the Secretary asserted that the court had no jurisdiction to review his determinations in the case. Explaining the rational basis of his determinations, the Secretary stated that he believed there was no dispute as to the facts; that there was no evidence to show that Joseph Thomas survived John Thomas; that the Examiner's determination that Joseph survived John was based on a presumption under Oregon law (as distinguished from a finding of fact based upon evidence); and that the law of the State of Oregon must govern this case.

By order dated September 17, 1958, the District Court dismissed petitioner's complaint and granted respondent's motion for summary judgment.

In his pleadings in the Court of Appeals on the substantive issues, respondent changed his previous position and asserted that the Examiner's determination that Joseph survived John was a finding of fact based on the evidence; that the Secretary was not obliged to follow Oregon law; and that "federal" rather than State law governed in the case.

The majority opinion of the Court sustained the District Court's dismissal of petitioner's complaint stating:

"Even if it [The Secretary's determination] were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable."[1]

The dissent of Judge Burger states in part:

"I believe that the Secretary should be required to follow state law concerning the presumption which, in this instance, controls descent and distribution and thus has the effect of substantive law.

"If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co., supra.*[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

"Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here. Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion."[2]

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals:

1. (a) Presents the issue of whether State or "federal" law governs the Secretary's determination of the heirs of deceased Indian Allottees. This question is of

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[1] 270 F. 2d 321.

[2] 270 F. 2d 325, 326.

such vital importance to an estimated quarter of a million American Indian Allottees or their heirs who are subject to the probate jurisdiction of the Secretary of the Interior as to merit review and resolution by this Court;

(b) Is in conflict with the mandate of the Congress in Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348;

(c) Is in conflict with the principles laid down by this Court in *Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938);

(d) Is in conflict with the decision of the 10th Circuit Court of Appeals in *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.*, et al, 117 F. 2d 940, 943 (C.C.A. 10, 1941).

2. (a) Presents issues regarding the extent to which the probate determinations of the Secretary may be reviewed by the Federal Courts and the availability of a judicial remedy to American Indians who are subject to the Secretary's probate jurisdiction;

(b) Is in conflict with the principles laid down by this Court in *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915), in *Kessler* v. *Strecker*, 307 U.S. 22, 34 (1938) and in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919);

(c) Is in conflict with decisions of the Eighth and Tenth Circuit Courts of Appeal in *Dixon* v. *Cox*, 268 F. 285 (C.C.A. 8, 1920), *Bowling* v. *United States*, 299 F. 438, 444 (C.C.A. 8, 1924) and *Peoria Tribe* or *Band of Indians* v. *Wea Townsite Co.* et al., 117 F. 2d 940 (C.C.A. 10, 1941);

(d) Is in conflict with the Court's previous rulings in the cases of *Homovich* v. *Chapman*, 89 U.S. App. D.C. 150, 191 F. 2d 761, 764 (1951), and *Seaton* v. *The Texas Company*, 103 U.S. App. D.C. 163, 256 F. 2d 718, 723, 724 (1958);

3. (a) Is erroneous and in conflict with the law of the State of Oregon as enunciated in *Hefford* v. *Metropolitan Ins. Co.*, 73 Ore. 353, 372, 144 P. 2d 695, 702 (1944);

(b) Is unreasonable and unsupported by the evidence of record.

I

The Secretary In The Position Asserted By Him In The Court Of Appeals Failed To Follow The Law Of The State Of Oregon As Required In The General Allotment Act And By The Principles Laid Down By This Court In *Erie R.R.* v. *Tompkins*.

The Secretary of the Interior took the position in the Court of Appeals that he is not required to follow State law, but may apply "federal" law in the instant case. This position was taken by the Secretary despite the express mandate of the Congress contained in Section 5 of the General Allotment Act of February 8, 1887, as amended, that State law shall govern in determining the heirs of a deceased Indian allottee.[1]

Section 5 of the General Allotment Act, supra, provides in pertinent part:

> "That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, *or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located*, and that at the expiration of said period the United States will convey the same by patent to said Indian, *or his heirs* as aforesaid, in

[1] 24 Stat. 388, 389; 25 U.S.C. sec. 348.

> fee discharged of said trust and free of all charge or incumbrance whatsoever." (Emphasis supplied).

Commenting on the above quoted language of the General Allotment Act, *Federal Indian Law* clearly states that the Secretary must follow State law in determining the heirs of deceased Indian Allottees:

> "As will be readily perceived, these provisions entirely withdraw from the operation of tribal laws and customs all matters of descent and partition concerning allotments made to Indians under the General Allotment Act, *and the laws of the State in which the land is situated must govern such matters, except insofar as these matters are otherwise covered by Federal statutes.*[1] (Emphasis supplied).

In *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.* et al, 117 F. 2d 940, 942 (C.C.A. 10, 1941), the Court of Appeals for the Tenth Circuit held that State law governs in matters concerning the descent and distribution of lands allotted to Indians under the General Allotment Act, supra.

The same view is expressed by Judge Burger as follows:

> "The Secretary is bound by the General Allotment Act to follow state law in matters concerning descent and distribution."[2]
>
> • • • •
>
> *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), did not merely concern cases brought in United States District Courts under diversity jurisdiction. There, Mr. Justice Brandeis made the sweeping statement: 'There is no federal general common law.' 304 U.S. at 78. Justice Brandeis' famous dictum really means, it seems to me, that state law should control unless there is some compelling reason to the contrary."[3]

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[1] *Federal Indian Law*, 1958 edition, at p. 506; this treatise was prepared under the supervision of the Solicitor of the Department of the Interior and published under the Department's auspices.

[2] 270 F. 2d 325.

[3] 270 F. 2d 325.

The Estate of John Thomas and the Estate of Joseph Thomas are composed of allotted Indian lands and derivative property located in the State of Oregon. Consequently, under the General Allotment Act, supra, and this Court's holding in *Erie R.R. v. Tompkins*, supra, the Secretary of the Interior was obliged to apply Oregon law in the instant case.

The tacit view of the Court of Appeals that "federal" law is applicable in the instant case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Peoria Tribe or Band of Indians* v. *Wea Townsite Co.*, et al, supra. Petitioner respectfully submits that these conflicting views should be resolved by this Court.

The position taken by the Secretary at the Court of Appeals level, implicitly sustained by the majority of the Court, that "federal" rather than State law is applicable has introduced a mass of confusion in the Department's probate administration of Indian Estates which embrace allotted Indian lands. For the question of whether "federal" or State law is applicable is not limited to the adjudication of this case, it affects an estimated quarter of a million Indian allottees or their heirs who are subject to the probate jurisdiction of the Secretary.[1]

II

The Secretary's Probate Determinations Under Sections 1 And 2 Of The Act Of June 25, 1910, As Amended, Are Reviewable By The Courts.

The majority of the Court of Appeals ruled that the Secretary's determination under Section 1 of the Act of June 25, 1910, supra, is final and conclusive, and not subject to review by the judiciary even if there has been error in the application of law to the facts of record.

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[1] House Report 2503 (82nd Cong. 2d Sess., Dec. 15, 1952)

It should be noted at the outset of this discussion on jurisdiction, that there is no question of public policy involved in the issue of whether the Indian, Emma J. Luton, or the Indian, Joe Hayes, is entitled to inherit the estates of Joseph and John Thomas. Essentially, the Examiner of Inheritance in this case is acting as a probate court in determining which of two *private* claimants is entitled to inherit the estates being probated. In this connection the following observations of the Court of Appeals in *Seaton* v. *The Texas Company*, (1958), 103 U.S. App. D.C. 163, 256 F. 2d 718, 723, 724, are singularly appropriate for application to this case:

> "When the controversy is fundamentally between two private interests, as here and as was so in *Moore* v. *Robbins*, supra . . . his discretion is not as great as when the controversy is between private interests on the one hand and the Secretary 'as guardian of the people,' on the other. . . . The law is not blind to such distinctions . . .
>
> "In this situation we think the court may decide whether the choice made by the Secretary between the private parties is plainly wrong in the eyes of the law.
>
> *"Unless judicial relief as between private interests is available when the judicial conscience concludes that to let the administrator's solution stand would leave uncorrected plain legal error, his authority would be so absolute as to be inconsistent with basic conceptions of a government under law, with advantage to neither administrator, public, nor private parties."* (Emphasis added)

Is the Indian Joe Hayes to understand that the Federal Courts will afford judicial relief to *non-Indians* when the Secretary has erred in the application of law in a matter involving private interests, and that no such judicial relief will be afforded to *Indians* in essentially the same situation?

The answer to this question is of interest not only to

the Indian Joe Hayes, but it is of great interest also to the estimated quarter of a million Indians who are subject to the probate jurisdiction of the Secretary of the Interior.

The Estate of Joseph Thomas was probated by the Secretary under Section 1 of the Act of June 25, 1910, supra, which authorizes the Secretary to probate the estates of Indian allottees who die intestate. This section provides that the Secretary's decision shall be "final and conclusive".

But, this court, in the case of *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915), laid down the principle that the conclusiveness to be accorded administrative determinations, is conclusiveness upon *matters of fact* only. This court has repeatedly held that an administrative determination may be set aside by the courts where error of law was committed.[1] This principle was specifically applied to probate determinations of the Secretary of the Interior by the Eighth Circuit Court of Appeals in the cases of *Dixon* v. *Cox*[2] and *Bowling* v. *United States*.[3] In the latter case the Court stated:

> "And such findings are conclusive *in the absence of a showing of fraud, error of law, or gross mistake of fact.*" (Emphasis added)

This view was also adopted by the 10th Circuit Court of Appeals in the case of *Peoria Tribe* or *Band of Indians* v. *Wea Townsite Co.* et al., 117 F. 2d 940, 942 (1941), and by *Federal Indian Law*.[4]

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[1] *Kessler* v. *Strecker*, 307 U.S. 22, 34 (1938); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919).

[2] 268 F. 285 (C.C.A. 8, 1920).

[3] 299 F. 438, 444 (C.C.A. 8, 1924).

[4] 1958 Edition at pages 78 and 365.

Consequently, on the question of reviewability by the Judiciary of the Secretary's determinations under Section 1 of the Act of June 25, 1910, supra, there is a conflict on the one hand between the Courts of Appeal for the Eighth and Tenth Circuits, and the Court of Appeals for the District of Columbia Circuit in the instant case. Petitioner respectfully submits that this conflict of opinion in the lower courts should be resolved by this Court.

The Estate of John Thomas was probated by the Secretary of the Interior under Section 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373.

The view that a Section 2 determination by the Secretary may be reviewed was forcefully expressed by Chief Judge Prettyman in the earlier case of *Homovich* v. *Chapman*, 89 App. D.C. 150, 191 F. 2d 761, 764 (1951) as follows:

> "The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts, and no case to the contrary is cited to us. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will provides that his determination 'shall be final and conclusive', therefore, Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so."

Referring to the *Homovich* case, respondent, himself, apparently conceded the authority of the courts to review his determination in a Section 2 case, where an Indian leaves a will, when he stated:

> "The jurisdiction to review rulings when an Indian has left a will under Section 2 of the 1910 Act is somewhat broader than the jurisdiction relating to intestate estate proceedings under Section 1. *Homovich* v. *Chapman*, 89 App. D.C. 150, 191 F. 2d 761 (1951)." [1]

Nevertheless, respondent contended in the Court of Appeals that the power of the judiciary to review the Secretary's determination in the Estate of John Thomas was *foreclosed by the action of the Examiner of Inheritance* when he applied his finding in the Estate of Joseph Thomas (a Section 1 case) to his determination in the Estate of John Thomas (a Section 2 case).

Thus the Executive Branch not only forecloses judicial review but also denies petitioner his right to a judicial remedy.

Considering respondent's contention, Judge Burger, in the following excerpt from his dissent, argued that judicial review in the estate of John Thomas could not be foreclosed at the option of the Examiner:

> "Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of both estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich* v. *Chapman*, 1951, 89 U.S. App. D.C. 150, 191 F. 2d 761, that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding." [2]

Criticizing the majority opinion with regard to this matter Judge Burger further stated:

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[1] Respondent's brief in the Court of Appeals at page 12.

[2] 270 F. 2d 322.

> Here the majority has completely and finally foreclosed all judicial review of an administrative determination that appellant is not entitled to inherit the estate of John Thomas (valued at $63,811.09). They have done this solely because a statute which has no application to the John Thomas estate prevents, so they hold, judicial review of the determination that appellant is not entitled to inherit the estate of Joseph Thomas (valued at $6,259.53). This then becomes a case where the majority permits a $6000 tail to wag a $63,000. dog. The majority has certainly ignored the presumption of reviewability if they have not indeed adopted a presumption of unreviewability."[1]

Discussing the general principles governing reviewability by the Courts, Judge Burger states:

> "Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 195 (1910);[2] *The King* v. *Plowright*, 3 Mod. 94, 87, Eng.Rep. 60 (K.B. 1686); 4 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 28 (1958).
>
> "Professor Jaffe has stated the general principle thusly: "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 420 (1958)."[2]

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[2] "Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

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[1] 270 F. 2d 323.

[2] 270 F. 2d 322, 323.

III

The Secretary's Determinations Are Erroneous And Unreasonable And Unsupported By The Evidence Of Record.

Petitioner contends that under the law of the State of Oregon [1] the Examiner erred in presuming *the date of* Joseph Thomas's death to be August 3, 1946, exactly 7 years from the date of his disappearance.

As Judge Burger states in his dissent:

> "The Oregon Supreme Court has held that in a disappearance case *no* presumption arises as to the *date* of death but only to the fact of death. *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P. 2d 695, 702 (1944):
>
> > "'The weight of authority, both in this country and in England, is that the presumption from seven years' absence *is of death alone* and not of the *time* of death. The presumption of death arises at the *end* of seven years, but by this it is not meant that death is presumed to have occurred at that time, but on some day within the seven year period. According to the leading case of *Nepean* v. *Doe d. Knight*, 2 M. & W. 894, 150 Eng. Rep. 1021 (Ex 1837), the probabilities are that the death took place a considerable time before expiration of the seven year period. In that case Lord Denman, C. J., said at p. 913 of the report [150 Eng. Rep. at 1029]: 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of *all the points of time the last day is the most improbable*, and most inconsistent with the ground of presuming the fact of death . . .'"
>
> (Emphasis added.)"

Judge Burger further states in the last page of his dissent:

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[1] *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P. 2d 695, 702 (1944).

"I believe that the Secretary should be required to follow state law concerning the presumption which in this instance, controls descent and distribution and thus has the effect of substantive law.[1]

"If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co.*, supra.[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

"Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here.

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[1] The Solicitor's view on this question coincides with judge Burger's as evidenced by the following quotation from his opinion in the instant case:

"25 CFR 81.20 provides that an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed to be dead. The Department in its determination of this issue has adopted the laws of the State of domicile of the decedent." (Decision of Solicitor, dated Nov. 6, 1957, in the instant case at J.A. 17A.)

However, this view was fundamentally changed by respondent in his brief in the Court of Appeals at page 8, as follows:

"The cases precluding the use of this presumption are not controlling. The Secretary is not required to follow state law, except for the laws of descent and distribution. Therefore, it was not error to apply the rule espoused in the federal courts permitting use of the presumption.

[8] "The earlier case of *Fink* v. *Prudential Ins. Co.*, 162 Ore. 37, 90 P. 2d 762 (1939), is not to the contrary because, under the circumstances of that case, the Court merely refused to indulge in any *presumption of death*. It did not reach the issue of a presumption as to the time of death." (footnote on last page of Judge Burger's dissent.)

Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion.

"For the foregoing reasons I would reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings."

Moreover, since Emma Luton was claiming the estate of the testator John Thomas as the representative of the devisee Joseph Thomas, she had the burden of proving that Joseph survived John. Having failed to do so, the devise to Joseph lapsed[1] and the estate of John Thomas was inherited by petitioner Joe Hayes under Oregon law.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

LEON BENEZRA
810 18th Street, N.W.
Washington 6, D.C.

RALPH CURRIN
CURRIN & FRENCH
Pendleton, Oregon

KOERNER, YOUNG, MCCULLOCH
& DEZENDORF
800 Pacific Building
Portland, Oregon
Attorneys for Petitioner

[1] 1 *Taylor Evidence* (11th Ed., 1920) sec. 200; 1 *Greenleaf Evidence* (13th Ed. 1876) sec. 41, footnote 2 at pp. 50, 51. In *Re Phene's Trusts*, Law Rep. 5 Ch. 139; In *Re Lewes's Trusts*, Law Rep. 11 Eq. 326. Taylor and Greenleaf on Evidence and the English cases cited herein were cited as authoritative by the Supreme Court in *Davie* v. *Briggs*, 97 U.S. 628 (1878).

[2] O.R.S. 111.020 (3) (4), Oregon Revised Statutes.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided July 9, 1959

Mr. Leon BenEzra for appellant.

Mr. Robert S. Griswold, Jr., Attorney, Department of Justice, with whom *Mr. Roger P. Marquis*, Attorney, Department of Justice, was on the brief, for appellee.

Before EDGERTON, DANAHER, and BURGER, *Circuit Judges*.

EDGERTON, *Circuit Judge:* Section 1 of the Act of June 25, 1910, 36 STAT. 855, as amended, 25 U.S.C. §372, provides in part:

> "When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. . . ."

Joseph Thomas, an Indian, disappeared August 3, 1939, and has not been heard from since. His father John Thomas, an Indian, died September 22, 1940, leaving a will made in 1923. After disposing of clothes, the will said: "all other property of any nature belonging to me or in which I have any interest to my son Joe Thomas." The Secretary of the Interior decided that the son survived the father and took his estate, and that Emma J. Luton, as the son's heir, took both estates.

If the son did not survive the father, (1) the father's devise to the son lapsed; (2) the father, not Emma Luton, was the son's heir; and (3) appellant Hayes, as the father's heir, took both estates. Appellant Hayes asks review and reversal of the Secretary's decision that the son survived the father and Luton is the heir.

Since the Secretary's decision that the son survived the father was an essential part of the Secretary's "final and conclusive" ascertainment of the son's legal heirs, it was a final and conclusive decision. It determined who took the son's property and also who took the father's property. We think it was final and conclusive for both these purposes. Even if it were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable. "'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939).

We see no basis for appellant's reliance on § 2 of the 1910 Act, 25 U.S.C. § 373. It provides (1) that the Secretary may prescribe regulations in accordance with which Indians may make wills disposing of trust property, and (2) that "no will so executed shall be valid . . . until it shall have been approved by the Secretary . . . ." As we held in *Homovich* v. *Chapman*, 89 U.S.App.D.C. 150, 153, 191 F. 2d 761, 764, this section does not prevent

judicial review of the Secretary's action in making regulations for executing wills or in approving wills. But even in regard to such matters, we said: "To be sure, if upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." Moreover, the present case does not turn on such matters. It is undisputed that the Secretary's regulations for making wills were valid, that the will of John Thomas was validly executed, and that the will was approved by the Secretary. The appellant attacks only the Secretary's decision that the son survived the father, and its consequences. As we have shown in the preceding paragraph of this opinion, we cannot disturb that decision.

We think the District Court was right in dismissing appellant's complaint.

Affirmed.

BURGER, *Circuit Judge, dissenting:* The resolution of this case turns on the factual issue as to whether John, the father, or Joseph, the son, died first. If the father died first, his property passed to his son Joseph under his will. If the son died first, the father inherited his son's property by intestate succession. The heir-at-law of the last survivor of the two is now entitled to both estates. The heirs of the two estates were the opposing litigants before the Examiner of Inheritance.

I—Jurisdiction

Although only one question is disputed, it must be constantly kept in mind that two separate estates are involved. Since the father died leaving a valid will, Section 2 of the 1910 Act, 36 Stat. 856, as amended, 25 U.S.C. § 373, controls the disposition of his estate. The son died intestate, hence Section 1, 36 Stat. 855, as amended, 25 U.S.C. § 372, controls his estate.

Yet the majority "see no basis for appellant's reliance" on Section 2. As I shall try to develop below, it might quite as well be said that there was no basis for the Secretary's reliance on Section 1. I believe the correct analysis is that both sections have equal bearing. I see no reason why the answer to the underlying question must first be given with respect to the Section 1 estate and then merely adopted without analysis for purposes of the Section 2 estate.

This, however, is exactly what the Secretary's Examiner did and the majority now adopt his arbitrary position and make it conclusive and therefore unreviewable. On June 20, 1956, the Portland, Oregon, Examiner of Inheritance entered an order in the matter of the son's estate, reciting:

> "Joseph Thomas [the son] is hereby presumed to have died intestate, and the date of his death is determined to have been on August 3, 1946, at the age of 35 years."[1]

All of the foundation for this determination was recited in the order and it is as follows:

> "The evidence taken at the hearings . . . indicates that diligent search has been made for the above named person [the son, Joseph Thomas] by interested and other parties without avail. The records show that the party had little regard for his relatives and had no local attachments of any kind and was in the habit of leaving home for considerable periods of time without notifying anyone of his whereabouts. Further, there is no evidence of any catastrophe involved in which Joseph Thomas may have perished at the time of his disappearance."

On the same day this order was entered, the Examiner of Inheritance entered another order approving the

[1] All parties agree that the father died on September 22, 1940, and that the son disappeared on August 3, 1939.

father's will and determining the "heir of subsequently deceased devisee [the son]," reciting:

> "A decree has been issued this date in the estate of Joseph Thomas, *presuming* him to have died on August 3, 1946, at the age of 35 years, which was 7 years from the time of his disappearance. The reasons for this are *fully* set forth in the Order in that case." (Emphasis added.)

In other words, the Examiner made a finding with respect to the son's Section 1 estate, and then in disposing of the father's Section 2 estate, merely adopted this finding without further consideration. Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of *both* estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich* v. *Chapman*, 89 U.S.App.D.C. 150, 191 F.2d 761 (1951), that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding.

Nor do I agree with the majority when they say that Section 2 has no relevance because it merely gives the Secretary authority to "approve" Indian wills. The Examiner determined who should inherit the property of John Thomas under his will. The authority to make such a determination must be found in Section 2 or else it does not exist. Section 1 does not give the Secretary any such authority; it deals only with intestate property. Section 2, which conferred upon John Thomas the right to devise property in accordance with the Secretary's regulations, thereby implicitly gave the Secretary authority to resolve the present dispute which arises from an exercise of that statutory right. This authority has been

exercised in this case, and seems to me subject to judicial review under *Homovich* v. *Chapman, supra.*

To summarize, the fact that the District Court may perhaps not have power to review the Secretary's Section 1 decision concerning the son's estate alone is irrelevant insofar as a Section 2 decision is concerned, and all judicial review should not be foreclosed simply because the dispositive finding is present in both decisions below. The Secretary argues that this may lead to "the absurd result of contradictory findings of the same fact." This argument is not convincing because, if the court should reverse one of the Secretary's determinations while not passing on the other, it has not thus prevented the Secretary himself from subsequently reviewing that decision which has been left untouched by the court. The problem of "contradictory findings" is within his power to correct. Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 195 (1910);[2] *The King* v. *Plowright*, 3 Mod. 94, 87 Eng.Rep. 60 (K.B. 1686); 4 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 28 (1958).

Professor Jaffe has stated the general principle thusly: "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 420 (1958). Here the majority has completely and finally

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[2] "Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

foreclosed all judicial review of an administrative determination that appellant is not entitled to inherit the estate of John Thomas (valued at $63,811.09). They have done this solely because a statute which has no application to the John Thomas estate prevents, so they hold, judicial review of the determination that appellant is not entitled to inherit the estate of Joseph Thomas (valued at $6,259.53). This then becomes a case where the majority permits a $6000 tail to wag a $63,000 dog. The majority has certainly ignored the presumption of reviewability if they have not indeed adopted a presumption of unreviewability.

My disagreement with the majority concerning jurisdiction to review requires me to analyze issues which they did not reach. As I see it, there are two further issues: (1) what is the scope of review and (2) within this scope was the District Court correct in granting summary judgment to the Secretary?

II—Scope of Review

As the majority point out, we said in *Homovich* v. *Chapman*, *supra*: "To be sure, if upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." The majority fail to note, however, that the *Homovich* opinion proceeds to hold that Section 10 of the Administrative Procedure Act[3] governs review of action taken by the Secretary under the authority of Section 2 of the 1910 Act.

Section 10(e) of the APA lays down broad general guides for the scope of review. These guides only infrequently answer specific problems as posed by actual cases. As Professor Davis has put it, "the degree of intensity of review is not necessarily susceptible of em-

[3] 60 Stat. 243 (1946), 5 U.S.C. § 1009.

bodiment in a word formula."[4] Yet we do find guides consistent with Section 10(e) of the APA in a phrase that runs through the cases: an administrative decision should be upheld unless it is not supported by substantial evidence on the record considered as a whole. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).[5] *Homovich* v. *Chapman* certainly did not intend to deviate from these established general formulas. If anything, the spirit as distinguished from the letter of that case tends to a broadening of the scope of review. This is clearly indicated by the court's holding there that Section 10 of the APA is applicable to cases arising under Section 2 of the 1910 Act.

III—Correctness of Decision

Turning to the final issue and applying these general guides for review, was the District Court right in granting summary judgment for the Secretary? I think not.

It is not clear from the record whether the Examiner of Inheritance *presumed* the son, Joseph Hayes, to have died exactly seven years after the date of his disappearance or whether he made this finding by weighing all the evidence. More likely he did the former, but whichever he did, his action seems clearly erroneous to me. In other words, if he made a presumption of law, he did so upon an improper interpretation of applicable law. If he made a factual determination, it is not supported by substantial evidence *on the record as a whole.*

Considering his finding first as a presumption of law, we are met at the outset with a difficult problem of con-

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[4] DAVIS, *op. cit. supra*, § 28.12 at 64.

[5] For general discussions, see DAVIS, *op. cit. supra;* Jaffe, *Judicial Review: Question of Fact*, 69 HARV.L.REV. 1020 (1956); Jaffe, *Judicial Review: Question of Law*, 69 HARV.L.REV. 239 (1955); Schwartz, *Gray vs. Powell and the Scope of Review*, 54 MICH.L. REV. 1 (1955).

flict of laws. The Oregon Supreme Court has held that in a disappearance case *no* presumption arises as to the *date* of death but only as to the fact of death. *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372, 144 P.2d 695, 702 (1944):

> "The weight of authority, both in this country and in England, is that the presumption from seven years' absence *is of death alone* and not of the *time* of death. The presumption of death arises at the *end* of seven years, but by this it is not meant that death is presumed to have occurred at that time, but on some day within the seven year period. According to the leading English case of *Nepean* v. *Doe d. Knight*, 2 M. & W. 894, 150 Eng. Rep. 1021 (Ex. 1837), the probabilities are that the death took place a considerable time before expiration of the seven year period. In that case Lord Denman, C. J., said at p. 913 of the report [150 Eng. Rep. at 1029]: 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; *of all the points of time the last day is the most improbable*, and most inconsistent with the ground of presuming the fact of death. . . .'" (Emphasis added.)

On the other hand, the United States Supreme Court has found it permissible for a tribunal, presumably in a disappearance case (where there is no evidence of any specific peril), to indulge in the presumption that life continued throughout the seven years necessary to raise the presumption of death. *United States* v. *Wildcat*, 244 U.S. 111 (1917); *Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U.S. 308 (1902). *But see Davie* v. *Briggs*, 97 U.S. 628 (1878). Thus the English concept adopted by Oregon and the concept enunciated by the Supreme Court are in disagreement.

Section 2 of the 1910 Act authorizes persons

> "having any right, title, or interest in any allotment held under trust or other patent containing restric-

> tions on alienation or individual Indian moneys or other property held in trust by the United States . . . to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior." 36 Stat. 856 (1910), as amended, 25 U.S.C. § 373.

The Secretary has prescribed no regulations which have any bearing on the presumption we are considering. Therefore, in order to find a source for this presumption, we must look outside the federal statute and outside any regulations promulgated thereunder.

There are only two possible sources in this case: general federal law or Oregon law. I think the Examiner was compelled to look to Oregon law. In *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956), the Court said:

> "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. [Citations omitted.] This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."

Here, admittedly we are not dealing with a matter of strictly domestic relations in the narrow sense. The problem is whether a certain fact, *i.e.*, the *time* of death, can be presumed as a matter of law. The Secretary is bound by the General Allotment Act to follow state law in matters concerning descent and distribution. 24 Stat. 389 (1887), as amended, 25 U.S.C. § 348. The Secretary argues, however, that the probem here is not one of descent and distribution but one of evidence and that therefore the General Allotment Act is not applicable.

Arenas v. *United States*, 197 F.2d 418 (9th Cir. 1952), held that the General Allotment Act did not compel the Secretary to follow California law in determining whether a certain adoption was valid. This was dispositive be-

cause only if the child was validly adopted would she be entitled to certain Indian property by virtue of intestate succession under Section 1 of the 1910 Act. This result—that the Secretary was not compelled to follow state law—seems contrary to the teaching that where there is a choice between federal and state law in determining the existence of a right (whether or not that right is created by a federal statute) state law should be preferred unless there is some overriding consideration to the contrary.[6] For this reason I would not follow the *Arenas* case as to this point.

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938), did not merely concern cases brought in United States District Courts under diversity jurisdiction. There, Mr. Justice Brandeis made the sweeping statement: "There is no federal general common law." 304 U.S. at 78.[7] Justice Brandeis' famous dictum really means, it seems to me, that state law should control unless there is some compelling reason to the contrary. Among other things the need for administrative uniformity over the whole country might well be such a "compelling reason," but no policy of national uniformity can be achieved here because the Secretary is required by the General Allotment Act to follow state laws of descent and distribution. It cannot therefore be maintained that regulation of Indian affairs is strictly a matter of federal rather than of state concern: Congress has spoken to the contrary. I believe that the Secretary should be required to follow state law concerning the presumption which, in this instance, con-

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[6] *Compare* Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956), *with* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); see De Sylva v. Ballentine, *supra*; RFC v. Beaver County, 328 U.S. 204 (1946).

[7] See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.PA.L.REV. 797 (1957); BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES, ch. 11 (1949).

trols descent and distribution and thus has the effect of substantive law.

If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co., supra.*[8] It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here. Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion.

For the foregoing reasons I would reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings.

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[8] The earlier case of Fink v. Prudential Ins. Co., 162 Ore. 37, 90 P.2d 762 (1939), is not to the contrary because, under the circumstances of that case, the Court merely refused to indulge in any *presumption of death*. It did not reach the issue of a presumption as to the time of death.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958.

Civil 859-58

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE.

United States Court of Appeals for the
District of Columbia Circuit

Filed July 9, 1959—Joseph W. Stewart, Clerk

APPEAL FROM the United States District Court for the District of Columbia.

Before: EDGERTON, DANAHER and BURGER, *Circuit Judges*.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Edgerton.

Dated: July 9, 1959.

Separate dissenting opinion by Circuit Judge Burger.

APPENDIX B

Filed United States Court of Appeals for the District of Columbia Circuit, Oct. 5, 1959. /s/ Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,813

JOE HAYES, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, APPELLEE

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: October 5, 1959

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 348, reads in part as follows:

> "That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; . . ."

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372, provides in part as follows:

> "When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. sec. 373, provides in part as follows:

> "Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on

alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior; *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior:"

25 C.F.R. pt. 15.1, reads in part as follows:

Administration of estates: The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part.

25 C.F.R. pt. 15.15, reads in part as follows:

Decision. The examiner of Inheritance shall, except as provided in Sec. 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and legatees who take under the will and the particular property which each is to receive, and shall construe any ambiguous provision of the will.

25 C.F.R. pt. 15.20, reads in part as follows:

Presumption of death. In accordance with the regulations in this part pertaining to other hearings, an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead.

Oregon Revised Statute: 41:360 Disputable Presumptions:

(26) A person not heard from in seven years is dead.

Oregon Revised Statutes 111.020:

(3) If the intestate leaves no lineal descendents surviving spouse or mother, such real property shall descend to his or her father . . .

(4) If the intestate leaves no descendents, surviving spouse, father, mother, brother or sister, such real property shall descend to his or her next of kin in equal degree . . .